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Responsibility of States for internationally wrongful acts

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Comments and information received from Governments

Report of the Secretary-General

I. Introduction

1. The International Law Commission adopted the articles on responsibility of States for internationally wrongful acts (State responsibility articles) at its fifty-third session, in 2001. In its resolution 56/83 of 12 December 2001, the General Assembly took note of the State responsibility articles adopted by the Commission, the text of which was annexed to that resolution, and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action. In its resolution 59/35 of 2 December 2004, the Assembly commended once again the State responsibility articles to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. Moreover, in the latter resolution, the Assembly requested the Secretary-General "to invite Governments to submit their written comments on any future action regarding the articles". It also requested the Secretary-General "to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard" and further requested the Secretary-General "to submit this material well in advance of its sixty-second session".[1]

2. By a note verbale dated 29 December 2004, the Secretary-General invited Governments to submit, no later than 1 February 2007, their written comments on any further action regarding the State responsibility articles. In that note, he also invited Governments to submit information regarding decisions of international courts, tribunals and other bodies referring to the articles no later than 1 February 2007. By a note verbale dated 13 January 2006, the Secretary-General reiterated this invitation.

* A/62/50.

[1] The compilation of decisions of international courts, tribunals and other bodies is contained in document A/62/62.

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3. As of 9 March 2007, the Secretary-General has received written comments from the Czech Republic (dated 31 January 2007), Germany (dated 28 February 2007), Kuwait (dated 31 January 2007), Norway, on behalf of the Nordic countries (dated 31 January 2007), Portugal (dated 28 February 2007) and the United Kingdom of Great Britain and Northern Ireland (dated 8 January 2007). These comments are reproduced below.

II. Comments on any future action regarding the articles on responsibility of States for internationally wrongful acts

Czech Republic

1. In the light of the practice of the competent Czech authorities and institutions, the Czech Republic believes that a consensus sufficient for the articles on responsibility of States for internationally wrongful acts to be adopted in the form of an international treaty has not yet been reached. Accordingly, the Czech Republic does not, in principle, regard the present state of affairs, with the General Assembly "taking note of the articles on responsibility of States for international wrongful acts" (resolution 56/83) and commending the articles to the "attention of the Governments, without prejudice to the question of their further adoption or other appropriate action" (resolution 59/35), as inconsistent with the current approach to the matter and requiring a radical change.

2. However, with regard to the importance and scope of the work which contributes to the codification and development of international law, the Czech Republic would favour the draft articles to be adopted by a General Assembly resolution. Such alternative would offer a greater chance for the document to become, in the view of the majority of States, acceptable as a proof of the existence of an *opinio juris* in the event of any future examination of the customary nature of these rules of international law.

Kuwait

[Original: Arabic]

Article 10: Conduct of an insurrectional or other movement

1. The title of the article is "Conduct of an insurrectional or other movement", and the term "movement" is treated in the same manner in paragraphs one and two.

2. It is the opinion of the Ministry of Justice that the expression "insurrectional or other movement" is inappropriate, or that its translation into Arabic is inappropriate, because it does not necessarily reflect reality and because of the numerous ways in which movements are described, inasmuch as that sometimes they are called a "reform" and other times a "coup d'état" as well as numerous other designations, all of which may differ in meaning not to mention form.

3. It is for these reasons that the Ministry is of the of the view that the terms describing "movements" should be deleted from the title as well as from the said paragraphs so as to read "movements" alone, thus conveying the purport of the text without making distinctions.

Article 12: Existence of a breach of an international obligation

4. The Ministry proposes replacing the phrase "not in conformity with" with the phrase "not in accord with" so that the text reads:

> "There is a breach of an international obligation by a State when an act of that State is not in accord with what is required of it by that obligation, regardless of its origin or character."

Article 23: Force majeure

5. The Ministry proposes the deletion of the second paragraph of this article because it states established general rules and thus there is no need to include the said paragraph in the draft. As a consequence of this proposal, the text of article 23 should be limited to that of the first paragraph as it is currently worded, which precludes the wrongfulness of an act among States due to force majeure or the occurrence of a sudden and unforeseen event, while replacing the phrase "not in conformity with an international obligation" with the phrase "not in accord with an international obligation".

Article 24: Distress

6. The title of the article is "Distress", and the term occurs more than once in the text of the article.

7. The expression "situation of distress", which is used in the article to preclude the "wrongfulness" of an act of a State, is perhaps ambiguous, broad and expatiated, and should be redrafted so as to more specifically define — with the new wording — the meaning of "distress", particularly since it has no analogue in the internal laws of States.

Article 26: Compliance with peremptory norms

8. The Ministry believes that "al-āmira" or "āmira" should be replaced, respectively, with "al-qaṭ'iyya" or "qaṭ'iyya" in keeping with the intent of the text and because "al-qawa'id al-qaṭ'iyya" is what is used in international law.

9. In that regard, the Ministry proposes that this change be made in every article of the draft in which "al-āmira" or "āmira" are found.

Norway (on behalf of the Nordic countries)

1. The Nordic countries, Denmark, Finland, Iceland, Norway and Sweden, once again commend the International Law Commission for the adoption in 2001 of draft articles on responsibility of States for internationally wrongful acts and commentaries thereto.

2. The draft articles meet the general satisfaction of the Nordic countries. The draft articles have in a few years since their adoption become the most authoritative statement available on questions of State responsibility. The draft articles express to a large extent customary law in the matter.

3. Moreover, in their judgements and advisory opinions, international courts such as the International Court of Justice and the European Court of Human Rights have referred to the draft articles.

4. In principle, the Nordic countries support the idea of a future convention on the responsibility of States. The Nordic countries, however, believe that the restatement of the law, such as these articles, should not be eroded by compromises and package-deals at a diplomatic conference aiming at elaborating a convention on State responsibility. To open the draft articles for negotiations could jeopardize the fragile balance contained in the articles. As a consequence, the Nordic countries believe that it is not advisable at this stage to initiate negotiations on a convention on State responsibility. However, in order to enhance future discussion on this very important topic, we see merit in keeping the item on the agenda of the General Assembly.

Portugal

1. We would like to start out by welcoming once again the conclusion of the work by the International Law Commission and by renewing our tribute to the Commission and to all the special rapporteurs who have dealt with the topic of State responsibility.

2. As we have already had the opportunity to state before the Sixth Committee in 2004, Portugal continues to believe this is an area of international law that deserves to be incorporated into a legal instrument that will certainly contribute in a decisive way to the respect of international law and for peace and stability in international relations.

3. This is a topic that has been maturing since 1949, when the International Law Commission first selected the subject of State responsibility as being suitable for codification. It was one of the first topics to be selected by the Commission as meeting that criterion.

4. It is clear to the Portuguese Republic that the draft articles on State responsibility could and should constitute the third structuring pillar of the international legal order set up after the Second World War. They are the Charter of the United Nations, the Law of Treaties — already codified in the Vienna Convention of 1969 — and the consequences of internationally wrongful acts.

5. States must not be over-cautious about moving forward in this area since the only concern is to establish the consequences of the internationally wrongful acts and not to provide for a definition of the wrongful act itself. State responsibility is only interested in the secondary rules and not on the primary rules that define the obligations of States. Furthermore, it could be done, if agreed, in the form of a contractual instrument.

6. If one wants convincing evidence for the opportunity and fundamental necessity to proceed in this field one only has to turn to State practice and to decisions of international courts and tribunals, including the case-law of the principal judicial organ of the United Nations, the International Court of Justice.

7. It would be, furthermore, senseless not to proceed in the development and codification of this matter and continue to proceed in others like diplomatic protection, liability and responsibility of international organizations when the main principles that guide the development of these latter subjects are the same that apply to State responsibility.

8. Therefore, Portugal considers that the Sixth Committee should carry on the task of adopting the articles on responsibility of States for internationally wrongful acts as a binding international convention.

9. In 2001, the General Assembly took note of the articles on responsibility of States for internationally wrongful acts presented by the International Law Commission and commended them to the attention of Governments. This was done, as stated in paragraph 3 of resolution 56/83, without prejudice to the question of their future adoption or other appropriate action.

10. After so many decades of maturation, in 2001 the subject was allowed to breathe for another three years.

11. In 2004, the General Assembly noted in the preamble to its resolution 59/35 that the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States and decided, in operative paragraph 4, to include this item in the agenda of its sixty-second session in 2007, thus allowing for another period of maturation of three years.

12. It is now, thus, six years since the General Assembly commended the articles on responsibility of States to the attention of Governments, and almost sixty years since the International Law Commission embarked on what is certainly one of its most important projects.

13. In view of the above, Portugal feels that the time is ripe for making a decision on the future action regarding the articles.

14. In order to better reflect on this issue, Portugal believes that it could be appropriate in a first stage, for the General Assembly to consider at its sixty-second session setting up an ad hoc committee with a mandate to discuss the question of the adoption of the articles on responsibility of States for internationally wrongful acts, including the possibility of elaborating an international convention on the matter.

United Kingdom of Great Britain and Northern Ireland

1. The United Kingdom of Great Britain and Northern Ireland once again extends its congratulations to the International Law Commission for completing in 2001 its important project on the topic of the responsibility of States for internationally wrongful acts. The product of that work, the draft articles on the responsibility of States for internationally wrongful acts, reflect the culmination of some 45 years of work by the Commission, Member States and the five Special Rapporteurs.

2. The Sixth Committee and the General Assembly have considered the future of the draft articles on two occasions. In 2001, at its fifty-sixth session, the Assembly welcomed the draft articles in resolution 56/83, the text of which was annexed to the resolution, and "commend[ed] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action". Three years later, at its fifty-ninth session in 2004, the Assembly postponed further consideration of the final form of the draft articles in the Assembly until the sixty-second session in 2007.

3. The United Kingdom is of the view that the action of the General Assembly in 2001 in commending the draft articles to the attention of Governments was the right course of action to adopt, and that no further action was necessary or desirable. For

the reasons set out below, this remains our firmly held opinion. We understand that other States share this view.

4. Reaching agreement on the text of the draft articles was not easy, and required intense negotiation and compromise. Consequently, the text of the draft articles in its entirety is not wholly satisfactory to any State. It is well known within the Sixth Committee that the United Kingdom has some concerns regarding certain provisions of the draft articles. Of course, some aspects of the draft articles are more controversial than others.

5. Despite this, States generally have accepted the draft articles in their current form. At present, the draft articles reflect an authoritative statement of international law and have been referred to by international courts and tribunals, writers and, more recently, domestic courts. As is evidenced by the table set out in section III of the present document, since 2001 the draft articles have gained widespread recognition and approval. Many States, including the United Kingdom, regularly turn to the draft articles and the commentaries as guidance on issues of State responsibility that arise in day-to-day practice. Interestingly, reliance on the draft articles is not restricted to generally accepted provisions. As is seen in section III, reference has also been made to more controversial articles, including those concerning countermeasures and violation of peremptory norms.

6. It is difficult to see what would be gained by the adoption of a convention. Resolution 56/83 provided the draft articles with a firmer standing than if the draft articles had not been annexed, and resolution 59/35 enhanced this standing. The draft articles are already proving their worth and are entering the fabric of international law through State practice, decisions of courts and tribunals and writings. They are referred to consistently in the work of foreign ministries and other Government departments. The impact of the draft articles on international law will only increase with time, as is demonstrated by the growing number of references to the draft articles in recent years.

7. This achievement should not be put at risk lightly. The United Kingdom considers that there is a real risk that in moving towards the adoption of a convention based on the draft articles old issues may be reopened. This would result in a series of fruitless debates that may unravel the text of the draft articles and weaken the current consensus. It may well be that the international community is left with nothing. Our view remains that any move at this point towards the crystallization of the draft articles in a treaty text would raise a significant risk of undermining the currently held broad consensus on the scope and content of the draft articles. Accordingly, we consider that it would be sensible and appropriate to take no further action on the draft articles at this point.

8. Even were a text to be agreed, it is unlikely that the text would enjoy the wide support currently accorded to the draft articles. The Commission's work on State responsibility differs from the more discrete and specific subject matter of other topics, in that the draft articles are a common thread running through all State practice and will have implications for a vast number of international legal issues. This is already evident in the wide range of areas in which references to the draft articles are occurring, from traditional areas of international law such as the use of force, to human rights and international trade law. For many States, including the United Kingdom, there is a difference between noting and utilizing the work of the Commission, even though there may be some concern as to certain elements, and

signing up to a convention that would be binding upon the State in all aspects. If few States were to ratify a convention, that instrument would have less legal force than the draft articles as they now stand, and may stifle the development of the law in an area traditionally characterized by State practice and case law. In fact, there is a significant risk that a convention with a small number of participants may have a de-codifying effect, may serve to undermine the current status of the draft articles and may be a "limping" convention, with little or no practical effect.

9. The preferable course of action is to take no further action on the draft articles, leaving the draft articles to exert a growing influence through State practice and jurisprudence. The United Kingdom is aware, however, that other States do not share this view, favouring instead the adoption of a convention based on the draft articles. Given the risks, we would urge those States to reconsider, having regard to the possible consequences of moving towards a convention.

III. Information on State practice regarding the articles on responsibility of States for internationally wrongful acts

Czech Republic

The Czech Republic is not aware of any reference to the articles having been made by courts or arbitral tribunals. The Czech Republic would mention as an exemption — without prejudice to the position of the Czech party — the partial award issued on 13 September 2001 in the arbitration proceedings CME Czech Republic v. the Czech Republic. Article 580 of the award shows that CME Czech Republic cited the commentary of the International Law Commission concerning the articles on the responsibility of States for internationally wrongful acts, arguing that a State can be held responsible for harm caused by a violation of an international treaty even if there are other tortfeasors, whether individuals or corporations, participating in the violation (the full text of the award is available on www.mfcr.cz).

Germany

1. The present report is intended to provide an overview of the practice of the Federal Republic of Germany with respect to the responsibility of States for internationally wrongful acts. It contains relevant judicial decisions from 2003 to December 2006.

2. The report is divided into five sections:

(a) State responsibility under international law and violations of individual rights

(b) Attribution of conduct to a State under international law

(c) Defences in the field of State responsibility

(d) State responsibility and violations of *ius cogens*

(e) Conclusions

A. State responsibility under international law and violations of individual rights

3. In the past few years German courts have on several occasions been seized with issues relating to German State practice in the field of State responsibility for internationally wrongful acts and its relationship with claims based on violations by the State of individuals' rights. The Courts have examined acts of both the legislative and the executive.

Compensation for Italian "military internees" subjected to forced labour from 1943-1945

4. This issue arose in connection with a statute establishing a foundation whose purpose was to pay compensation to former forced workers. The dispute concerned Italian soldiers interned by Germany in the Second World War who felt that they should also be able to claim compensation from the Foundation.

5. The Federal Constitutional Court was called upon to rule on the constitutionality of the exclusion of Italian military internees from the scope of the Law on the Creation of a Foundation "Remembrance, Responsibility and Future" ("Erinnerung, Verantwortung, Zukunft") (hereinafter referred to as the Foundation Law); decision of the Federal Constitutional Court of 28 June 2004; case No. 2 BvR 1379/01.

6. In 1999 and 2000, negotiations took place between the Government of Germany and the Governments of other States which were belligerent parties in the Second World War about financial compensation for individuals who had been subjected to forced labour in German companies and in the public sector. These led to the enactment of the Foundation Law, passed by the German legislature on 2 August 2000, which established the Foundation "Remembrance, Responsibility and Future". The purpose of the Foundation is to make financial compensation available through partner organizations to former forced labourers and to those affected by other injustices in the national Socialist era.

7. According to section 11 (3) of the Foundation Law, prisoners of war are not eligible to claim compensation. The explanatory memorandum to the bill justifies this as follows:

> As a matter of principle, prisoners of war (POWs) who were subjected to labour cannot obtain any benefits because the detaining State is permitted under international law to enlist POWs as workers. Persons released from captivity as prisoners of war and assigned the status of civilian workers may, if they otherwise fulfil the requirements, be eligible under sub-section (1). (Bundestag printed paper 14/3206, p. 16).

8. The complainants submitted that the Foundation Law infringed their basic rights, as their claims to compensation for being subjected to forced labour and mistreatment were precluded therein.

9. The Federal Constitutional Court dismissed their complaints. The Court based its decision on the fact that the Convention (IV) respecting the Laws and Customs of War on Land of 1907 (Hague Convention of 1907) cannot as a matter of principle be used to found individual compensation claims. What it governed was a secondary right that exists only in association with the relationship under international law between the relevant States. The Court cited article 1 of the International Law

Commission draft articles on this point. The only primary right that affected members of the population have against a State occupying a given territory, on the basis of their international law relationship with that State, is for it to comply with the prohibitions of international humanitarian law. In principle, the Court continued, it is not altogether impossible that the national law of the responsible State may grant the victim a personal claim parallel to the injured State's claim under international law. This however would be dependent upon the specific design of the applicable national legal framework.

10. Under the Hague Convention of 1907, which sets out special rules on international liability for violations of humanitarian international law (the law of war), prisoners of war may be forcibly enlisted as workers under certain carefully defined conditions. This fact could justify the exclusion of prisoners of war from the Foundation Law.

The obligation of the Federal Republic of Germany to make reparation for "reprisals" committed by members of the German armed forces during the occupation of Greece in the Second World War

11. The scope of State responsibility for internationally wrongful acts was also addressed in the Distomo case by the Federal Court of Justice on 26 June 2003 (case No. III ZR 245/98) and by the Federal Constitutional Court on 15 February 2006 (case No. 2 BvR 1476/03). These decisions concerned the recognition of a Greek judgement on the payment of compensation by the Federal Republic of Germany to Greek victims of war crimes committed by a German SS unit. The plaintiffs (and later complainants) were Greek nationals. Their parents had been killed on 10 June 1944 in the course of retaliatory action taken against the inhabitants of the Greek village of Distomo by members of an SS unit forming part of the German occupying forces. The District Court of Livadia in Greece ruled in October 1997 that the heirs of the murdered villagers were entitled to compensation from the Federal Republic of Germany. The plaintiffs thus sought recognition of the Greek judgement in the Federal Republic of Germany, and to this end applied to the Federal Court of Justice and the Federal Constitutional Court.

12. In their decisions, both the Federal Constitutional Court and the Federal Court of Justice first noted that under international law a State may invoke immunity from the jurisdiction of the courts of another State on the basis of the principle of State immunity if, as in this case, the proceedings related to its sovereign actions.

13. The courts further held that the plaintiffs were not entitled to damages or compensation from the Federal Republic of Germany for any internationally wrongful acts. At least at the time in question, the prevailing view of international law was still the traditional one that it only applied between States. Private individuals were thus not viewed as subjects of international law. They only enjoyed indirect protection under international law. In the case of internationally wrongful acts injurious to foreign nationals, the persons affected did not themselves have any rights vis-à-vis the responsible State; only their home State did. It was up to the State to make a formal claim in respect of an internationally wrongful act injurious to its nationals pursuant to the principle of diplomatic protection. In 1943-1945 this principle that States alone were entitled to bring such claims also applied to human rights violations.

14. The Federal Constitutional Court further held in case No. 2 BvR 1476/03 that it is only due to the more recent development of greater protection for human rights that international law now grants individuals rights in their own name.

Compensation claims brought by victims of a North Atlantic Treaty Organization air strike on a bridge in Varvarin, Serbia

15. The Federal Court of Justice was again called upon to consider the issue of individual claims and State responsibility for internationally wrongful acts in the Varvarin Bridge case on 2 November 2006 (case No. III ZR 190/05). On 24 March 1999, on the basis of a decision adopted by member States, the North Atlantic Treaty Organization (NATO) commenced air operations against the Federal Republic of Yugoslavia with the stated goal of preventing an imminent humanitarian disaster as a result of the Kosovo conflict. The German air force participated in these operations with the approval of the German Bundestag. On 30 May 1999, NATO fighter planes bombed a bridge in the Serbian town of Varvarin. Ten people were killed and 30 more were injured. All the victims were civilians. No German fighter planes were directly involved in the attack on the bridge. The plaintiffs, nationals of the former Yugoslavia, claimed compensation from the Federal Republic of Germany for the death of their relatives and for their own injuries. They asserted that the respondent was liable for the consequences of the NATO attack on the bridge on the basis of international humanitarian law and German law on governmental liability.

16. The Federal Court of Justice dismissed the plaintiffs' appeal. The plaintiffs had no compensation claim against the Federal Republic of Germany under international law, because violations of the law of armed conflict only give rise to international compensation claims against the responsible State by the injured State, i.e., the home State of the victims, and not by the victims themselves. This interpretation of international law, which the Court had already applied in the Distomo case for the period up to the end of the Second World War (see paras. 11-14 above), was now said by the Court to be still applicable in the present day. The Court supported its position in particular by referring to article 91 of the First Additional Protocol of 8 June 1977 to the Geneva Convention of 12 August 1949. With regard to the International Law Commission's draft articles, the Court held as follows:

> The fact that the Geneva Additional Protocols, in line with the principles of State responsibility, relate only to claims between States and not to direct reparation claims by individuals, is confirmed for instance by the fact that *the draft articles on the responsibility of States for internationally wrongful acts submitted by the International Law Commission (ILC) in 2001 [...], in particular articles 42 ff. thereof*, envisage only the invocation of responsibility by the injured State, and not by injured individuals. It is true that these draft articles only constitute binding international law insofar as they codify customary international law [...]. Nonetheless, they do indicate that the contrary view has yet to emerge. Rather, international tort claims are still to be considered as giving rise to State-to-State (compensation) payments [...]. In particular, the mere fact that rules exist which in specific cases permit persons whose human rights have been violated to bring individual applications (e.g. article 34 of the [European Convention on Human Rights] [...]) is not capable of supporting any alternative interpretation of article 91 of the First Additional Protocol to the Geneva Conventions of 1949, because of the special

nature of international humanitarian law compared with general human rights law [...].

B. Attribution of conduct to a State under international law

17. The following decisions in particular addressed the issue of attribution of conduct under international law.

Organs placed at the disposal of a State by another State and the application of International Law Commission draft article 6

18. In a decision of 27 July 2006 (case No. 4 O 234/05 H) Constance Regional Court ruled on the liability of the Federal Republic of Germany to a Russian airline in connection with an air crash in German airspace, referring in its reasoning inter alia to article 6 of the International Law Commission draft articles.

19. On 1 July 2002 a commercial aircraft belonging to a Russian airline collided in mid-air with a commercial aircraft belonging to DHL International Ltd. Conflicting instructions and misunderstandings between the pilots, Swiss air traffic controllers and the onboard anti collision systems caused the planes to collide at an altitude of 34,890 feet above German territory and to crash to the ground. Following the accident, the Russian airline applied to the Regional Court for a declaration that the Federal Republic of Germany was obliged to indemnify it against liability to pay compensation to the injured parties.

20. The Regional Court decided in favour of the airline. The judges came to the conclusion that the Swiss air traffic controllers in Zurich, who were responsible for air traffic control at the time of the collision, were acting as a German State organ, since ensuring air safety is an inherent State duty. The Court further held that Germany had not placed this organ at the disposal of Switzerland. For this it gave the following reasons:

> The requirements for a (factual) loan of an organ under international law, by which means the respondent [Germany] wishes to transfer responsibility to the Swiss State, are not fulfilled, for the simple reason that the respondent had not outsourced air traffic control organs that were part of its governmental structures to an agency outside its sovereign territory and made them available to the Swiss air traffic control services. There can thus be no question of a "loan" as defined for the purposes of this international law doctrine.

21. The Court made the following further comments on the applicability of the international doctrine of lending organs:

> It is doubtful whether this legal concept [of lending organs] has already evolved into customary law, although it is difficult to judge since there has not been sufficient practice on the issue [...]. It is also uncertain whether, in the absence of recognition as customary law, the rules on lending organs constitute a general principle of international law along the lines of article 38 (1) (c) of the International Court of Justice Statute and article 6 of the International Law Commission [draft articles].

22. The Court stated, that in the present case it did not have to decide this question, since the principles on lending organs only govern the inter-State responsibility of subjects of international law and the case in hand concerned

individual claims. Moreover, Germany had not, the Court concluded, placed any air traffic control organ at Switzerland's disposal.

State responsibility for aiding or assisting an internationally wrongful act (article 16 of the International Law Commission draft articles)

Decisions on the legality of the extradition of Yemeni nationals to the United States of America

23. The Federal Constitutional Court ruled on the legality of the extradition of Yemeni nationals to the United States of America in two decisions of 5 November 2003 (case Nos. 2 BvR 1243/03 and 2 BvR 1506/03). The first complainant was arrested in January 2003 at Frankfurt am Main together with the other complainant, his secretary, on the basis of an arrest warrant issued by a United States District Court. He was accused of having provided terrorist groups with money, weapons and communications equipment and of having recruited new members for these groups between October 1997 and the time of his arrest. Conversations with a Yemeni national working as a confidential informant for the American investigation and prosecution authorities had played a significant role in the two men's decision to travel to Germany. The United States requested that the two men be extradited for prosecution in the United States. The Frankfurt am Main Higher Regional Court ruled that the extradition was admissible. Following constitutional complaints of the two Yemeni nationals the Federal Constitutional Court had to decide upon the question of whether there is a general rule of international law that forms an integral part of German law, pursuant to which no one may be extradited if they have been abducted from their State of origin to the requested State in order to circumvent a ban on extradition in the former State.

24. The constitutional complaints were dismissed as unfounded. In its reasoning, the Federal Constitutional Court cited article 16 of the International Law Commission draft articles to illustrate that States may be held responsible for aiding or assisting the commission of an internationally wrongful act.

25. The Court said that the key in these cases was the appraisal of the circumstances under which the Yemeni nationals reached Germany and their possible legal consequences for the extradition proceedings. If the actions of the confidential informant acting for the United States investigation authorities were regarded as contrary to international law, this could potentially give rise to an obstacle precluding extradition from Germany. There would be the risk that by extraditing the complainants, Germany would be acting in support of the potentially illegal actions of the United States and would thus make itself responsible vis-à-vis Yemen under international law. The Constitutional Court held as follows:

> Pursuant to article 25 of the Basic Law, general rules of international law must be respected by the legislature when enacting national law and by the executive and courts when interpreting and applying such national law [...]. From this it follows in particular that the administrative authorities and courts of the Federal Republic of Germany are as a matter of principle barred by article 25 of the Basic Law from interpreting and applying national law in a way that violates such general rules of international law. They are also obliged to refrain from doing anything that lends effectiveness to acts performed in violation of general rules of international law by non-German sovereign

entities within the territorial area of application of the Basic Law and are prohibited from playing any decisive role in such acts by non-German sovereign entities. [...]

The territorial sovereignty of a State, which is an expression of State sovereignty, in principle prohibits sovereign acts by other States or sovereign entities on the territory of that State. In this context, private individuals' acts can be attributed to a State if, for instance, such acts are controlled by that State.

Tortious action on the part of the United States would establish its responsibility under international law vis-à-vis Yemen. In such a case, there would be the risk that by extraditing the complainant, Germany would be acting in support of the potentially illegal actions of the United States and would thus make itself responsible vis-à-vis Yemen under international law. That State responsibility can under specific conditions be established by acting in support of third party actions that are contrary to international law is shown by article 16 of the International Law Commission's draft convention on State responsibility, which codifies customary international law in this field (cf. Crawford, The International Law Commission's articles on State responsibility, 2002, article 16, pp. 148 ff.).

26. The Federal Constitutional Court continued that regarding the facts of the present case the case law on the subject is far from uniform. Where it relates to the fight against the most serious crimes — such as supporting international drug trafficking or fostering terrorism — luring a suspect out of one State's territory by deceit has not been considered an obstacle precluding criminal prosecution, at least not to the extent required to demonstrate State practice. No distinction should be drawn that could justify the application of a different standard for the existence of an obstacle precluding extradition.

Decision on a German soldier's refusal to obey a command in connection with the Iraq conflict

27. The Federal Administrative Court handed down a judgement on 21 June 2005 in a case concerning a professional soldier who in April 2003 refused to execute the order of his superior to work on the further development of military software (case No. BVerwG 2 WD 12.04). In his statement of claim, the soldier submitted that his conscience did not permit him to obey commands capable of supporting hostilities in Iraq. He asserted that his superior had, before giving the command, explicitly been unable to exclude the possibility that the work on the project might foster an involvement of the Federal Armed Forces in the war against Iraq, which he personally held to be contrary to international law.

28. The Federal Administrative Court had the following to say on that last point:

Neither the NATO Treaty, the NATO Status of Forces Agreement, the NATO Status of Forces Supplementary Agreement nor the Convention on the Presence of Foreign Forces in Germany require the Federal Republic of Germany to support acts by its NATO partners which contravene the Charter of the United Nations and violate international law [...].

> An internationally wrongful act can consist of an action, or — if there is an international obligation to act — an omission [...]. Aiding or assisting an internationally wrongful act is itself an internationally wrongful act.

C. Defences in the field of State responsibility

29. In a decision of 27 June 2006 (case No. 2/21 O 122/03), Frankfurt am Main Higher Regional Court examined the claims brought against Argentina by private investors who had purchased Argentine bearer bonds. Argentina failed to pay out on these because of the continuing national emergency "in the social, economic, administrative, financial and exchange areas".

30. The Higher Regional Court decision considered article 25 of the International Law Commission draft articles, which was referred to in order to determine the effect of the state of emergency.

31. The Court deliberated as follows:

> The respondent [Argentina] can no longer invoke a state of emergency based on insolvency as a defence to the plaintiff's claims [...] because the facts underlying the dishonouring of the debts no longer apply and because the respondent has not submitted that repaying all its debts would result in a state of emergency.
>
> It is undisputed that a state of emergency can only suspend the debtor State's obligations to pay. The obligations revive when the prerequisites for the state of emergency are no longer given. This is now the case, since the reasons that the respondent originally cited to justify the state of emergency and the debt moratorium no longer exist:
>
> (a) Necessity under international law is described in article 25 (1) (a) of the International Law Commission draft articles as being subject inter alia to the following conditions: [...].
>
> Since article 25 of the International Law Commission draft contains an exception to the obligation to comply with international law, the general threshold for necessity was set very high. The Committee on International Monetary Law of the International Law Association (ILA) attempted to further define the broad term "essential interest" in the context of financial crises of debtor States, taking into account the case law of international courts and arbitral tribunals as well as the relevant literature [...]. It concluded that in the event of insolvency of a debtor nation, a temporary suspension of payments for the purpose of debt restructuring was permissible if the State would otherwise no longer be able to guarantee the provision of vital services, internal peace, the survival of part of the population and ultimately the environmentally sound preservation of its national territory.
>
> This is in line with the submissions made by the respondent and with the international literature it has referred to. These sources do not consider a national emergency to exist simply when it is economically impossible for the State to pay the debts. Additional special circumstances must also be present, which make it evident that meeting the financial obligations would be self-destructive, e.g. because servicing the debt would mean that basic State

functions (health care, the administration of justice, basic education) could no longer be fulfilled.

32. The Higher Regional Court held that the requirements for a national emergency, and thus the defence of "necessity", were no longer given in Argentina.

D. State responsibility and violations of *ius cogens*

33. The Federal Constitutional Court decision of 26 October 2004 (case No. 2 BvR 955/00) concerned the question of the return of property expropriated without compensation in the Soviet zone of occupation between 1945 and 1949. The Court referred inter alia to article 40 (2) of the International Law Commission draft articles.

34. In September 1945 all private landholdings of more than 100 hectares were expropriated without compensation in the Soviet occupation zone. On 15 June 1990, in the course of the negotiations on the accession of the German Democratic Republic to the Federal Republic of Germany, the two Governments issued a Joint Declaration on the Settlement of Open Property Issues. With regard to the retransfer of property rights in land and buildings, this Joint Declaration stated that expropriations under occupation law or on the basis of sovereign acts by occupying Powers (1945-1949) were "no longer reversible".

35. The constitutional complaints filed by the heirs of expropriated landholders were dismissed as unfounded by the Constitutional Court. The Court started off by stating that German State organs are bound by international law pursuant to article 20 (3) of the Basic Law. However, a direct constitutional duty was not to be assumed indiscriminately for any and every provision of international law, but only to the extent that it corresponded to the concepts of the Basic Law. According to the Constitutional Court, this duty to respect international law has three elements. First, German State organs have a duty to comply with the provisions of international law that bind the Federal Republic of Germany. Second, the legislature must guarantee that the German legal system is capable of rectifying any violations of international law committed by its own State organs. Third, German State organs may have a duty to enforce international law in their own area of responsibility if other States violate it. They have a duty to refrain from anything that gives effect to an act that is undertaken by non-German sovereign entities within the area of application of the Basic Law in violation of general rules of international law. This duty may, however, conflict with the demands of international cooperation between States and other subjects of international law, which is also desired by the constitution, in particular if a violation of law can only be terminated by cooperation. This manifestation of the duty of respect can in such cases only be given concrete shape in interaction with and balanced against Germany's other international obligations.

36. Through article 1 (2) and article 25, sentence 1, the Basic Law also recognizes the existence of mandatory international norms, that is norms that are not open to unilateral or other disposition by the States (*ius cogens*). The Court continued as follows:

> The concept of peremptory rules of public international law has recently been affirmed and further developed in the articles of the International Law Commission on the law of State responsibility [...]. This field of law is a core area of general international law that governs the (secondary) legal

consequences of a State's violation of its (primary) obligations under international law. Article 40 (2) of the International Law Commission articles on the responsibility of States contains the definition of a serious violation of *ius cogens* and obliges the community of States to cooperate in order to terminate the violation using the means of international law. In addition, a duty is imposed on States not to recognize a situation created in violation of *ius cogens*.

37. The Constitutional Court, however, held that in the case before it, the constitutional duty to respect international law had not been violated. The expropriations in the Soviet occupation zone in Germany in the years 1945 to 1949 were the responsibility of the Soviet occupying Power and could not be attributed to the exercise of sovereign authority by the Federal Republic of Germany. Sovereignty over the territory of the German Reich vacated by the Soviet occupying Power passed to the German Democratic Republic upon its foundation. In the Court's opinion, the German Democratic Republic could, on the basis of its territorial sovereignty, have reversed measures passed by the occupying Power, but on the points in question had refrained from doing so. Upon German unification, the sovereign competence to decide on the continued validity of the occupying Power's expropriations passed to the Federal Republic of Germany. The Hague Convention respecting the Laws and Customs of War on Land, which was binding at the time of the occupation, may give rise to claims between the occupying Power and the returning sovereign. A party to a conflict that does not observe the provisions of Hague law is, the Court said, obliged to pay damages. The injured State's right to damages is, however, subject to its disposition. In the Two-Plus-Four Talks, the Federal Republic of Germany tacitly waived any claims under the Hague Convention. In the Court's opinion, no peremptory international norm prevents such a waiver. At the time of the expropriations, there was no generally held legal conviction that the protection of citizens' property was a universally applicable rule of *ius cogens*. Nor could the Court establish that any peremptory norm of international law had emerged at a later date that excluded *ex nunc* the possibility of treating the existing situation as lawful. In its opinion, universal international law has never contained and still does not contain a guarantee of citizens' property as a human rights standard. Nor do the provisions of the Vienna Convention on the Law of Treaties or the International Law Commission draft articles on State responsibility imply that the occupying Power's expropriations — assuming they violated mandatory international law — should be treated as void by the Federal Republic of Germany. These provisions only stipulated that treaty obligations are to be considered void if their purpose conflicts with a peremptory norm of international law. In all other cases, however, the States merely had a duty to cooperate constructively.

38. In the Court's opinion, the Federal Republic of Germany had satisfied this duty of cooperation by bringing about reunification through peaceful negotiation. In this context, the Federal Government was entitled to the conclusion that treating the expropriations as void would be incompatible with achieving reunification in a spirit of cooperation. The Court further held that Germany had not breached its duty not to enrich itself from another State's breach of international law. Such a duty does not necessarily serve the purpose of returning the regained assets to the former owners in particular. What is required is that, overall, assets are sufficiently distributed. In the Court's opinion the equalization arrangements made by the Federal Republic of

Germany were in conformity with the objectives of international law. In this connection, the Court said, it should also be taken into consideration that German unification was a process in which the Federal Republic of Germany was entitled to incorporate individual issues such as the land reforms into an overall package that represented a balancing of numerous interests.

E. Conclusions

39. As the present report shows, German courts have referred on numerous occasions to the International Law Commission draft articles on the responsibility of States for internationally wrongful acts. This attention can be seen as indicative of the recognition accorded in German national practice to the principles contained in the International Law Commission draft articles.

40. The draft articles are an important point of reference for national courts, which can use them as an aid to interpreting the facts before them in a way that is consistent under international law. German courts have not hesitated to applying the International Law Commission draft articles on the responsibility of States for internationally wrongful acts, which proves that they are a useful statement of customary international law.

Index of court decisions and Internet sites

41. Following is a list of relevant court decisions ad Internet sites:

Court decisions

- Decision of the Federal Constitutional Court of 28 June 2004 (case No. 2 BvR 1379/01)
- Decision of the Federal Court of Justice of 26 June 2003 (case No. III ZR 245/98)
- Decision of the Federal Constitutional Court of 15 February 2006 (case No. 2 BvR 1476/03)
- Decision of the Federal Court of Justice of 2 November 2006 (case No. III ZR 190/05)
- Decision of the Constance Regional Court of 27 July 2006 (case No. 4 O 234/05 H)
- Decisions of the Federal Constitutional Court of 5 November 2003 (case Nos. 2 BvR 1243/03 and 2 BvR 1506/03)
- Decision of the Federal Administrative Court of 21 June 2005 (case No. BVerwG 2 WD 12.04)
- Decision of the Frankfurt am Main Higher Regional Court of 27 June 2006 (case No. 2/21 O 122/03)
- Decision of the Federal Constitutional Court of 26 October 2004 (case No. 2 BvR 955/00)

Internet sites

- Federal Constitutional Court: www.bundesverfassungsgericht.de

- Federal Court of Justice: www.bundesgerichtshof.de/
- Federal Administrative Court: www.bundesverwaltungsgericht.de
- Frankfurt am Main Higher Regional Court: www.olg-frankfurt.justiz.hessen.de
- Constance Regional Court: www.lg-konstanz.de
- www.germanlawjournal.com/print.php?id=743
- http://germanlawjournal.com/article.php?id=359
- www.dw-world.de/dw/article/0,2144,2223146,00.html
- www.alertnet.org/thenews/newsdesk/L02518534.htm
- www.asil.org/ilib/ilib0701.htm#j2
- www.wsws.org/articles/2005/sep2005/iraq-s27.shtml

United Kingdom of Great Britain and Northern Ireland

No.	*Court*	*Case name*	*Citation*	*Reference*	*Article(s) referred to*
1.	International Court of Justice	*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*	Separate joint opinion of Judges Higgins, Kooijmans and Buergenthal, 14 February 2002. Reported at [2002] ICJ Rep 89	Paragraph 89	Commentary to article 30 (Cessation and non-repetition)
2.	International Court of Justice	*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*	Dissenting opinion of Judge ad hoc Van den Wyngaert, 14 February 2002. Reported at [2002] ICJ Rep 183	Footnote 154	Article 14 (Extension in time of the breach of an international obligation)
3.	International Court of Justice	*Oil Platforms (Islamic Republic of Iran v. United States of America)*	Separate opinion of Judge Simma. 6 November 2003. Reported at [2004] ICJ Rep 161	Paragraphs 12 and 19	Countermeasures — footnote reference to articles 49-54
				Paragraphs 75-78	Article 47 (Plurality of responsible States)
4.	International Court of Justice	*Case concerning Avena and other Mexican Nationals (Mexico v. United States of America)*	Separate opinion of Judge ad hoc Sepulveda, 31 March 2004	Paragraphs 70-71	Commentary to article 35 (Restitution)
5.	International Court of Justice	*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*	Advisory Opinion of 9 July 2004	Paragraph 140	Article 25 (Necessity)
6.	International Court of Justice	*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*	Declaration of Judge Buergenthal	Paragraph 4	Article 21 (Self-defence)
7.	International Court of Justice	*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*	Separate opinion of Judge Kooijmans	Paragraphs 40-45	Article 41 (Particular consequences of a serious breach of an obligation under this chapter)
8.	International Court of Justice	*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*	Separate opinion of Judge Higgins	Paragraph 37	Commentary to chapter III (Serious breaches of obligations under peremptory norms of general international law)
9.	International Court of Justice	*Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*	Judgment of 19 December 2005	Paragraph 293	Commentary to article 45 (Loss of the right to invoke responsibility) in the context of waiver of right to bring a counterclaim

No.	Court	Case name	Citation	Reference	Article(s) referred to
				Paragraphs 213-214	Implicit reference to article 4 (Conduct of organs of a State)
10.	International Court of Justice	*Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*	Separate opinion of Judge Simma, 19 December 2005	Paragraph 35	Article 48 (Invocation of responsibility by a State other than an injured State)
				Paragraph 36	Article 44 (b) and Commentary thereto (Exhaustion of local remedies)
				Paragraph 40	Commentary to Chapter III (Serious breaches of obligations under peremptory norms of general international law)
11.	International Court of Justice	*Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*	Dissenting opinion of Judge ad hoc Kaleka	Paragraph 54	Commentary to article 7 (Excess of authority or contravention of instructions)
12.	Eritrea-Ethiopia Claims Commission	*Prisoners of War: Eritrea's Claim 17*, between the State of Eritrea and the Federal Democratic Republic of Ethiopia	Partial award, 1 July 2003	Paragraph 159	Article 50 (Obligations not affected by countermeasures)
13.	Arbitration Panel	*Dispute Concerning Article 9 of the OSPAR Convention (Ireland v. United Kingdom)*	Final award, 2 July 2003	Paragraph 145	Articles 4 (Conduct of organs of a State) and 5 (Conduct of persons or entities exercising elements of governmental authority)
14.	International Centre for Settlement of Investment Disputes (ICSID) Arbitration Panel	*Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (case No. ARB/97/3)	Decision on annulment of 3 July 2002. Reported at 19 *ICSID Rev. — FILJ* 89 (2004); 41 *ILM* 1135 (2002); 6 *ICSID Rep.* 340 (2004); 125 *I.L.R.* 58 (2004)	Footnote 17	Articles 2 (Elements of an internationally wrongful act of a State, 4 (Conduct of organs of a State) and 12 (Existence of a breach of an international obligation)
				Paragraphs 95 and 97	Article 3 (Characterization of an act of a State as internationally wrongful)
15.	ICSID Arbitration Panel	*Mondev International Ltd. v. United States of America* (case No. ARB(AF)/99/2)	Award of 11 October 2002. Reported at 42 *I..M* 85 (2003); 6 *ICSID Rep.* 192 (2004); 125 *I.L.R.* 1 10 (2004)	Footnote 9, page 19	Article 14(1) (Extension in time of the breach of an international obligation) Article 13 (International obligation in force for a State)
				Paragraph 68	Commentary to article 11 (Conduct acknowledged and adopted by a State as its own)
				Paragraph 115, footnote 47, page 40	General reference to provisions in the commentary on interference with contractual rights. Presumably a reference to article 3 (Characterization of an act of a State as internationally wrongful)

No. Court	*Case name*	*Citation*	*Reference*	*Article(s) referred to*
			Paragraph 149	General reference to provision in commentary on interference with contractual rights. Presumably a reference to article 3 (Characterization of an act of a State as internationally wrongful)
16. ICSID Arbitration Panel	*Marvin Roy Feldman Karpa v. United Mexican States* (case No. ARB(AF)/99/1)	Award and dissenting opinion of 16 December 2002. Reported at 18 *ICSID Rev. — FILJ* 488 (2003); 42 *ILM* 625 (2003); 7 ICSID *Rep.* 341 (2005)	Page 592	General reference
17. ICSID Arbitration Panel	*ADF Group Inc. v. United States of America* (case No. ARB(AF)/00/1)	Award of 9 January 2003. Reported at 18 *ICSID Rev. — FILJ* 195 (2003); 6 *ICSID Rep.* 470 (2004)	Paragraph 166	Article 4 (Conduct of organs of a State)
			Footnote 184, page 283	Article 7 (Excess of authority or contravention of instructions)
18. ICSID Arbitration Panel	*CMS Gas Transmission Company v. Argentine Republic* (case No. ARB/01/8)	Decision on objections to jurisdiction, 17 March 2003. Reported at 42 *ILM* 788 (2003);7 *ICSID Rep.* 492 (2003)	Paragraph 108	Article 4 (Conduct of organs of a State)
19. ICSID Arbitration Panel	*Técnicas Medioambientales, Tecmed, S.A. v United Mexican States* (case No. ARB(AF)/00/2)	Award of 29 May 2003. Reported at 19 *ICSID Rev — FILJ* 158 (2004); 43 *ILM* 133 (2004)	Footnote 26, paragraph 120, footnote 138 and footnotes 187 and 217	Article 3 (Characterization of an act of a State as internationally wrongful)
20. ICSID Arbitration Panel	*The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (case No. ARB (AF)/98/3) (NAFTA)	Award of 26 June 2003. Reported at 42 *ILM* 811 (2003), 7 *ICSID Rep.* 442 (2005)	Paragraph 149	Article 44 (Admissibility of claims)
21. ICSID Arbitration Panel	*Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (case No. ARB/00/5)	Award of 23 September 2003	Paragraph 123	General reference to articles
22. ICSID Arbitration Panel	*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (case No. ARB/02/06)	Decision of the Tribunal on objections to jurisdiction of 29 January 2004. Reported at 8 *ICSID Rep.* 518 (2005)	Paragraph 122 and footnote 54	Article 3 (Characterization of an act of a State as internationally wrongful)
23. ICSID Arbitration Panel	*Tokios Tokelės v. Ukraine* (case No. ARB/02/18)	Decision on jurisdiction of 29 April 2004. Reported at 20 *ICSID Rev. — FILJ* 205 (2005)	Footnote 113, page 242	Article 4 (Conduct of organs of a State)
24. ICSID Arbitration Panel	*Consortium Groupement L.E.S.I-Dipenta v. Algeria* (case No. ARB/03/8)	Award of 10 January 2005. Reported at 19 *ICSID Rev. — FILJ* 426 (2004)	Paragraph 18(ii)	Provisions on attribution — no specific reference to an article
			Paragraph 19(ii)	Article 8 (Conduct directed or controlled by a State)
25. ICSID Arbitration Panel	*Impregilo S.p.A. v. Islamic Republic of Pakistan* (case No. ARB/03/3)	Decision on jurisdiction of 22 April 2005	Paragraphs 312 and 313	Article 14 (Extension in time of the breach of an international obligation)
26. ICSID Arbitration Panel	*CMS Gas Transmission Company v. Argentine Republic* (case No. ARB/01/8)	Award of 12 May 2005. Reported at 44 *ILM* 1205 (2005)	Paragraphs 311 and 313-331	Articles 25 (Necessity) and 26 (Compliance with peremptory norms)
			Paragraph 393	Article 27 (Consequences of invoking a circumstance precluding wrongfulness)

No.	*Court*	*Case name*	*Citation*	*Reference*	*Article(s) referred to*
27.	Ad hoc Arbitration Panel	*Eureko BV v. Poland*	Partial award and dissenting opinion of 19 August 2005	Paragraphs 128-132	Article 4 (Conduct of organs of a State) and also the commentary to article 5
				Paragraphs 187-188	Commentary to articles 1 and 2
28.	ICSID Arbitration Panel	*Noble Ventures, Inc. v. Romania* (case No. ARB/01/11)	Award of 12 October 2005	Paragraph 53	Responsibility in national vs international legal systems
				Paragraph 69	Article 4 (Conduct of organs of a State)
				Paragraph 70	Article 5 (Conduct of persons or entities exercising elements of governmental authority)
				Paragraph 81	Article 7 (Excess of authority or contravention of instructions)
				Paragraph 82	Distinction between attribution of commercial and governmental conduct
29.	ICSID Arbitration Panel	*Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (case No. ARB/97/3)	Decision on jurisdiction of 14 November 2005	Paragraph 74, footnote 62	Article 14 (Extension in time of the breach of an international obligation)
30.	LCIA Arbitration Panel UNCITRAL	*EnCana Corporation v. Republic of Ecuador* (LCIA case No. UN3481, UNCITRAL)	Award of 3 February 2006	Paragraph 154	Articles 5 (Conduct of persons or entities exercising elements of governmental authority) and 8 (Conduct directed or controlled by a State)
31.	ICSID Arbitration Panel	*Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt* (case No. ARB/04/13)	Decision on jurisdiction of 16 June 2006	Paragraph 89	Articles 4 (Conduct of organs of a State) and 5 (Conduct of persons exercising elements of governmental authority)
				Paragraph 122	Article 15 (Breach consisting of a composite act)
32.	ICSID Arbitration Panel	*Azurix Corp. v. Argentine Republic* (case No. ARB/01/12)	Award of 14 July 2006	Paragraphs 46 and 50	Articles 4 (Conduct of organs of a State) and 7 (Excess of authority or contravention of instructions)
33.	UNCITRAL (NAFTA) Arbitration Panel	*Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*	Decision on objections to jurisdiction of 20 July 2006	Footnote 1, page 3	Article 4 (Conduct of organs of a State)
34.	ICSID Arbitration Panel	*ADC Affiliate Ltd and ADC & ADMC Management Limited v. Republic of Hungary* (case No. ARB/03/16)	Award of 2 October 2006	Paragraph 494	Article 31 (Reparation) and commentary
35.	ICSID Arbitration Panel	*LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (case No. ARB/02/1)	Decision on liability of 3 October 2006	Paragraphs 225, 260 and 264	Article 27 (Consequences of invoking a circumstance precluding wrongfulness)
				Paragraphs 245-259	Article 25 (Necessity)
36.	ICSID Arbitration Panel	*Patrick Mitchell v. Democratic Republic of the Congo* (case No. ARB/99/7)	Decision on the application for annulment of the award, 1 November 2006	Footnote 30	Article 27 (Consequences of invoking a circumstance precluding wrongfulness)

No. Court	Case name	Citation	Reference	Article(s) referred to
37. European Court of Human Rights — Grand Chamber	*Ilascu and others v. Moldova and the Russian Federation (application No. 48787/99)*	Judgement on the merits, 8 July 2004	Paragraphs 319-321	Articles 7 (Excess of authority or contravention of instructions) and 15 (Breach consisting of a composite act) and the commentary to article 14 (Extension in time of the breach of an international obligation)
38. European Court of Human Rights — Grand Chamber	*Blecic v. Croatia (application No. 59532/00)*	Judgement on the merits, 8 March 2006	Paragraph 48	Articles 13 (International obligation in force for a State) and 14 (Extension in time of the breach of an international obligation)
39. Inter-American Court of Human Rights	*Myrna Mack Chang v. Guatemala (complaint No. 10.636)*	Opinion of Judge Cancado Trindade, 25 November 2003, Reported at Ser. C. No. 101 [2003] IACHR 4	Paragraph 8	Articles 40 (Application of this chapter — peremptory norms) and 41 (Particular consequences of a serious breach of an obligation under this chapter)
40. World Trade Organization	*United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (AB-2001-3)*	Report of the Appellate Body, 8 October 2001, WT/DS192/AB/R	Paragraph 120	Article 51 (Proportionality)
41. World Trade Organization	*United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (AB-2001-9)*	Report of the Appellate Body, 15 February 2002, WT/DS202/AB/R	Paragraph 259	Article 51 (Proportionality)
42. World Trade Organization	*United States — Tax Treatment for "Foreign Sales Corporations"*	Decision of the Arbitrator, 20 August 2002, WT/DS108/ARB	Footnote 52, page 13	Article 51 (Proportionality)
			Paragraphs 5.58-5.60	Article 49 (Object and limits of countermeasures)
43. World Trade Organization	*United States — Measures Affecting Cross-Border Supply of Gambling and Betting Services*	Report of the Panel, 10 November 2004, WT/DS285/R	Paragraphs 6.128 and 6.129	Article 4 (Conduct of organs of a State) [States also commented on article 4 in their submissions — Part 2, Page C-16; C-20-1]
44. World Trade Organization	*Korea — Measures Affecting Trade in Commercial Vessels*	Report of the Panel, 7 March 2005, WT/DS273/R	Paragraph 7.39	Article 5 (Conduct of persons or entities exercising elements of governmental authority) [articles 4, 5 and 8 relied upon by the Republic of Korea in its submissions to the Panel, part 7, page F-13, para. 6]
45. World Trade Organization	*European Communities — Measures Affecting Trade in Commercial Vessels*	Report of the Panel, 22 April 2005, WT/DS301/R	Paragraphs 4.190 to 4.191, 4.196, 4.256 to 4.258	Article 52 (Conditions relating to resort to countermeasures)
			Paragraphs 5.36 and 7.183	Article 49(2) (Object and limits of countermeasures) [Arguments of the United States]
			Paragraph 6.11	Article 4 (Conduct of an organ of a State)
46. World Trade Organization	*United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (Drams) from Korea (AB-2005-4)*	Report of the Appellate Body, 27 June 2005, WT/DS296/AB/R	Paragraph 69; footnote 179, page 41; and footnote 188, page 43	Article 8 (Conduct directed or controlled by a State)

No.	Court	Case name	Citation	Reference	Article(s) referred to
47.	World Trade Organization	*Mexico — Tax Measures on Soft Drinks and Other Beverages*	Report of the Panel, 7 October 2005, WT/DS308/R	Footnote 73, page 64 and paragraph 8.180	Commentary to article 49 (Object and limits of countermeasures)
				Paragraphs 5.54 and 5.55	Article 50 (Obligations not affected by countermeasures)
48.	World Trade Organization	*European Communities — Selected Customs Matters*	Report of the Panel, 16 June 2006, WT/DS315/R	Paragraph 4.706	Article 4 (Conduct of organs of a State)
49.	World Trade Organization	*European Communities — Selected Customs Matters (ARB-2006-4)*	Report of the Appellate Body, 13 November 2006, WT/DS315/AB/R	Footnote 218, page 33	Article 4 (Conduct of organs of a State) [relied upon by the EC in argument]
50.	House of Lords (United Kingdom of Great Britain and Northern Ireland)	*R v. Lyons and others*	14 November 2002, reported at [2002] UKHL 44	Lord Hoffman, paragraph 36	Chapter II, Part two (Restitution)
51.	House of Lords (United Kingdom of Great Britain and Northern Ireland)	*A and others v. Secretary of State for the Home Department (No. 2)*	8 December 2005, reported at [2005] 3 WLR 1249; [2005] UKHL 71	Paragraph 34	Article 41 (Particular consequences of a serious breach of an obligation under this chapter)
52.	Court of Appeal (Civil Division) [England and Wales]	*R (On the application of Al-Jedda) v. Secretary of State for Defence*	29 March 2006, reported at [2006] HRLR 27; [2006] EWCA Civ 327 CA (Civ)	Paragraph 66	Commentary to article 26 (Compliance with peremptory norms)
53.	Supreme Court of Judicature, Queen's Bench Division, Divisional Court (United Kingdom of Great Britain and Northern Ireland)	*R (On the Application of Al Rawi and Others) v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*	4 May 2006, reported at [2006] HRLR 30; [2006] EWHC 972 QBD (Admin)	Paragraph 69	Articles 40 (Application of this chapter) and 41 (Particular consequences of a serious breach of an obligation under this chapter)
54.	House of Lords [United Kingdom of Great Britain and Northern Ireland]	*Jones v. Ministry of Interior for the Kingdom of Saudi Arabia and others*	14 June 2006, reported at [2006] UKHL 26; [2006] 2 WLR 1424	Paragraphs 12 and 76-78	Articles 4 (Conduct of organs of a State) and 7 (Excess of authority or contravention of instructions)
55.	European Court of Justice	*Kobler v. Austria*, Case C-224/01	Opinion, 1 January 2003, reported at [2004] All ER (EC) 23	Paragraph 47	Article 4(1) (Conduct of organs of a State)